No. 21737

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HONOLULU LUMBER CO., LTD.,

Appellant,

vs.

AMERICAN FACTORS, LTD., CITY MILL CO., LTD., HAWAII BUILDERS SUPPLY CO., LTD., ISLAND LUMBER CO., LTD., LEWERS & COOKE, LTD., MID PAC LUMBER CO., LTD., et al.,

Appellees.

APPELLEES' ANSWERING BRIEF

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APPELLEES' ANSWERING BRIEF

Statement of Jurisdiction

This is an appeal from a final judgment in favor of the appellees rendered by the United States District Court for the District of Hawaii in an action brought by the appellant pursuant to 15 U.S.C. §§15 and 26. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. Notice of appeal was filed on October 12, 1966, thirty days after entry of judgment on September 12, 1966 and after Order Denying Motion to Vacate Withdrawal of Counsel and Order Denying Motion to Vacate and Motion for Rehearing entered on September 27, 1966.

Statement of the Case

The complaint in this action was filed November 30, 1961 alleging violations of sections 1 and 2 of the Sherman Act and sections 2, 3, 7 and 8 of the Clayton Act against nine defendants. (Record pp. 1-14). After a delay of more than three years, the appellant filed an amended complaint on November 13, 1964 alleging only violations of sections 1 and 2 of the Sherman Act against six defendants. (Record pp. 269-283). During the three years there was a period of more than sixteen months (September 28, 1962 - February 10, 1964) without a single entry on the docket and the complaint was dismissed with prejudice on October 15, 1964 for failure of the appellant to file its amended complaint in a timely manner, with the order of dismissal allowing the appellant thirty days within which to set aside the dismissal by filing its amended complaint. (Record pp. 257-259).

Upon the filing of the amended complaint, the appellees moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure for failure of the appellant to comply with the order of the District Court requiring the appellant to put its claim in a more definite statement. (Record pp. 290-300). As a result of the motion to dismiss, the allegations in the complaint relating to section 2 of the Sherman Act were dismissed with leave to amend. (Record pp. 311-313). The appellant did not amend the complaint and the

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appellees' answers were filed on March 4, 1965. (Record pp. 314-341). At this time the appellant had conducted what it describes as "extensive pretrial discovery" (Opening Brief p. 3), consisting of a single set of written interrogatories. The appellant took no further action in the case until September 6, 1966 after a motion to dismiss had been filed by the appellees, which was more than eighteen months from the date the appellees filed their answers.

On July 9, 1965, the action was called in a general call of the docket and continued at the appellant's request. On March 10, 1966, the appellant's local counsel advised Mr. Arthur Tibbits, appellant's principal counsel who was to handle the trial of the case, of his withdrawal from the action. (Record p. 346). On June 10, 1966 the action was called again, and the action was set for pretrial on September 6, 1966 at the direction of the District Court, not by the request of the appellant as indicated in the Appellant's Opening Brief (Opening Brief pp. 3 and 10).

On June 17, 1966 the appellees served a notice to take the deposition of the appellant by its president, Preston Low, and to produce for examination certain business records. The deposition was set for June 28, 1966. On June 24, 1966 appellant's local counsel obtained the approval of the District Court for withdrawal as counsel. (Record pp. 342-343). The appellant failed to appear at the deposition without obtaining any

extension or continuance from the District Court or from the appellees. It appears that Preston Low was present in Honolulu between June 17, 1966 and June 28, 1966. (Record p. 366).

No extension or continuance of the date of pre-trial conference was granted. On August 25, 1966, twelve days prior to the date of the pretrial conference, the appellees, being unable to conduct discovery, moved to dismiss the complaint for failure of the appellant to appear at its deposition and for lack of prosecution. (Record pp. 347-356). The hearing on the motion to dismiss was set for 2:30 p.m. on September 2, 1966. (Record p. 356). On the morning of September 2, 1966, the District Court received a telegram from the appellant's counsel stating that he would not attend the conference. (Record p. 454). After the hearing, the District Court granted the motion to dismiss. Thereafter the appellant filed motions and affidavits with numerous explanations but neither appellant nor counsel for appellant appeared at hearings held on September 2, 1966, September 20, 1966 or September 26, 1966, or at the pretrial conference scheduled for September 6, 1966.

Questions Involved

Whether the District Court, upon the record and circumstances in this action, abused its discretion in ordering that the action be dismissed for want of prosecution and for failure of appellant to appear for deposition.

Whether the District Court abused its discretion in

denying the appellant's motion to vacate withdrawal of counsel and motion to vacate dismissal.

Summary of Argument

The District Court did not abuse its discretion in dismissing this action for failure of the appellant to attend deposition and lack of prosecution where the case had been pending for almost five years; the complaint had been dismissed once for failure of the appellant to plead in a timely manner; the appellant had taken no action in the case for a period of 16 months and another period of 18 months immediately prior to dismissal during which time the case was at issue; the appellant failed to appear for its deposition; the appellant failed to maintain local counsel as required by the local rules of the District Court; the appellant's principal counsel, who was to handle the trial, notified the District Court that he would not attend a scheduled pretrial conference; and the appellant's counsel failed to appear at the pretrial conference and at three other hearings involving the action.

The District Court did not abuse its discretion in denying the appellant's motions to vacate withdrawal of counsel and order of dismissal where the appellant had failed to object to withdrawal of counsel until after the dismissal of the case and three months after the withdrawal; and where the appellant offered no excuse as to the various defaults and delays in the case except the unwillingness of the appellant to pay for the

expenditures of litigation.

ARGUMENT

1. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE DISMISSAL OF THIS ACTION FOR LACK OF PROSECUTION AND FOR FAILURE TO APPEAR FOR DEPOSITION.

In Appellant's Opening Brief the grounds for dismissal (lack of prosecution and failure to appear for deposition) are treated as different issues but it is submitted that the grounds are not separable since the failure of the appellant to attend its deposition is one of the facts evidencing lack of prosecution and such failure constitutes ample ground in itself for dismissal for want of prosecution.* The proper question on appeal is whether the District Court abused its discretion in dismissing the action based upon the entire record and circumstances of the action, including the failure of appellant to attend its deposition.**

In Link v. Wabash R. Co., 370 U.S. 626, 82 Sup.Ct. 1386 (1962), the United States Supreme Court affirmed the dismissal of an action by a District Court for want of prosecution

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*See Fisher v. Dover Steamship Co., 218 F.2d 682 (2d Cir. 1954).

**Whether the appellant's failure to appear for deposition constituted sufficient ground per se for the District Court to dismiss the action is not before the Court, but for the Court's reference the appellees have included a separate section in reply to the appellant's contention that the failure was excusable.

on the part of the appellant where appellant's counsel failed to attend a pretrial conference without obtaining the consent of opposing counsel or the District Court for a continuance. In reviewing the District Court's order of dismissal and the affirmance by the Court of Appeals, the Supreme Court emphasized the relevance of the entire history of the case in the determination of the existence of lack of prosecution on the part of the appellant. The Court stated (370 U.S. at 633-635):

> "On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion. It was certainly within the bounds of permissible discretion for the court to conclude that the telephone excuse offered by petitioner's counsel was inadequate to explain his failure to attend. And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation that petitioner had been deliberately proceeding in a dilatory fashion. . . .
>
> . . .
>
> "We need not decide whether unexplained absence from a pretrial conference would _alone_ justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on _all_ the circumstances that were brought to its attention, including the earlier delays. . . ." (Emphasis in original.)

As in _Link_, counsel for the appellant in the instant case requested a continuance of a scheduled pretrial conference

immediately before the date of the conference. However, in Link the District Court did not advise appellant's counsel that the request would be denied. In the instant case appellant's counsel was so informed (Record p. 465) and the appellant's counsel simply advised the District Court by telegram that he would not attend the pretrial conference. The telegram was received by the District Court on September 2, 1966 (Record p. 454) prior to the scheduled hearing on the appellees' motion to dismiss under Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure.* After the hearing on September 2, 1966, the District Court granted the appellees' motion to dismiss. The appellant's counsel failed to appear either at the hearing on the motion to dismiss on September 2, 1966 or at subsequent hearings held on September 20, 1966 and September 26, 1966. The excuses offered by the appellant are "inability to secure new

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*Rule 37(d) provides in part:
". . .If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, . . .the court on motion and notice may . . .dismiss the action. . . ."

Rule 41(b) provides in part:
". . .For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . ."

local counsel as required by Rule 1(e)* of the District Court local rules and because of the lack of finances to pay for travel expenses of its counsel from his office in San Francisco to Honolulu and return." (Opening Brief, p. 6).

Although the history of the litigation in Link is somewhat similar to the instant case, the dilatoriness of the appellant in the instant case is considerably more evident than in Link. The Link case had been pending six years as opposed to five years in the instant case. However, two years of the delay in Link were the result of an appeal of a judgment on the pleadings. There was one 19-month period of inactivity in Link as opposed to two periods of 16 months and 18 months, respectively, in the instant case. In addition to the delays and periods of inactivity, the complaint in the instant case was dismissed once for failure to file pleadings in a timely manner; the appellant failed to appear for its deposition, counsel for appellant refused to appear at a scheduled pretrial conference and failed to appear at three hearings in the action held during

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*Rule 1(e) of the Rules of Court for the United States District Court for the District of Hawaii provides:
"(e) Permission to Participate in a Particular Case.
Any member in good standing of the bar of any court of the United States or of the highest court of any state, but not an active member of the bar of this court, may, upon oral or written motion, be granted permission to participate in the conduct of a particular case in this court, but such motion shall be allowed only if such attorney associates with him an active member of the bar of this court, who shall at all times meaningfully participate in the preparation and trial of the case."

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September 1966. Nothing in the record in Link approaches the dilatoriness shown in the record herein.

It should be noted that the spirited dissent in Link by Justice Black on the grounds that the client should not be penalized for the default on the part of his lawyer has no application in this case. The dismissal resulted in large part from the failure of appellant's president to attend the deposition and from his refusal to pay for the hiring of local counsel or for the travel expenses of his San Francisco counsel. Mr. Low apparently has funds as evidenced by his travels to Hong Kong on personal business. (Record p. 366). Mr. Low states that in the past he has advanced funds to the appellant for this action but that "he is no longer willing to do so, except to a limited extent." (Record p. 365). No authority has been found allowing a plea of poverty on the part of a corporation to justify delay in litigation or failure to make court appearances, particularly where the corporation has access to funds. Even in a case where an indigent individual is plaintiff, the case will be dismissed for want of prosecution if the individual is unable to obtain counsel and he refuses to represent himself. See Reid v. Charney, 235 F.2d 47 (6th Cir. 1956).

The appellant offers various excuses for the defaults of the appellant and his counsel between June 1966 and September 1966, but the summary of the excuses is that the appellant refused to spend any money to prosecute the appeal

and allegedly assumed that the appellees and the District Court would not object to continuing the case in hopes that the appellant might find a way to prosecute the case without any expenditure on its part. Furthermore, there is no explanation whatsoever of the reason for the delay from March 1965, when the case was finally at issue, until June 1966, and the appellant's pretrial statement shows that the appellant has been deliberately proceeding in dilatory fashion. Mr. Tibbits represented to the District Court in plaintiff's Pretrial Statement (Record pp. 361-364), that the appellant has been ready for trial since June 10, 1966. (Record p. 364). If this is true, the appellant must have been ready for trial since March 1965 when the appellees' answers were filed. The appellant had local counsel at that time and its discovery was apparently completed. However, the appellant made no request to place the action on the trial calendar. In fact, the appellant did nothing for a year and a half--until after the action had been dismissed.

Rather than showing any valid excuse, the appellant has shown only unexplained delay. This action has been pending almost five years and the appellant claims to have been prepared to go to trial for over a year, March 1965-June 1966 (and it purports to have had local counsel during this period). During this time the appellant not only failed to make any effort to bring the case to trial but also neglected to attend a duly noticed deposition, making no attempt to make any substitute

arrangements for such deposition. Following the unexplained delay in bringing the case to trial the appellant lost its local counsel and now presents this fact as its excuse for further delay.

In Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940), the District Court dismissed an action which had been at issue for a period of twenty months without any action being taken by the plaintiff. The Court on its own motion notified counsel that the case would be called for dismissal for want of prosecution under the local rule of the District Court providing that the case may be dismissed if pending for more than one year without any proceedings of record having been taken. Six days after the dismissal, counsel for appellant filed a notice of substitution of attorneys, advising that he had been substituted as counsel for appellant. He also filed numerous affidavits explaining the failure of previous counsel to act and the failure of substitute counsel to enter the case in a timely manner. On motion for reinstatement and motion to vacate the order of dismissal, based upon the affidavits, the motions were denied. The appellant appealed from the order of dismissal and the refusal of the Court to reinstate the case. The Court of Appeals in affirming the District Court stated (115 F.2d at 408):

"Fundamentally, but two questions are presented: (1) Did the lower court have the power to enter such an order of dismissal; and (2) if so, was there an abuse of discretion.

. . .

"This power to dismiss for want of prosecution may be exercised by the court of its own motion, though no action to secure such result be taken by the defendant. . .Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence. . . .

"'<u>The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal</u>.' Inderbitzen v. Lane Hospital, supra [17 Cal.App.2d 103, 61 P.2d 516]. . . .We do not find here any abuse of discretion on the part of the court below in dismissing the cause, for the record shows that the cause had been called sixteen times before being set for dismissal and the present counsel had been corresponding with the original counsel, relative to assuming the duties of attorney for plaintiff, for a period of almost eight months, during which time the former was having the case 'watched,' apparently without disclosure to the court which was calling the case and receiving no response. It was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay. . . ." (Emphasis added.)

It is submitted that the appellant has made no showing that it has used diligence at any stage of the proceeding to expedite this case to a final determination. It was well within the discretion of the District Court to find such lack of diligence on the part of both appellant and its counsel where

there have been years of unexplained delay together with numerous defaults allegedly resulting from the refusal of the appellant to furnish litigation expenses.

2. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT IN DETERMINING THAT THE APPELLANT'S FAILURE TO APPEAR FOR DEPOSITION CONSTITUTED A PROPER GROUND FOR DISMISSAL.

As appears from the record herein, the plaintiff's deposition by examination of the appellant's president, Preston Low, was noticed by the appellees for June 28, 1966 (Record pp. 351-352). The affidavit of Preston Low filed September 6, 1966 (Record pp. 365-367), states that he was in Honolulu on June 20, 1966 and that Mr. Low was on his way to Hong Kong and requested Mr. Shim to obtain a continuance of the deposition. Mr. Low apparently did not wait around to see whether Mr. Shim could obtain such a continuance. The mere fact that he requested Mr. Shim to obtain a continuance constitutes his sole excuse for not attending his duly noticed deposition. Mr. Low now states, after the action has been dismissed, that he is willing and at all times has been willing to have his deposition taken by the appellees at any time. However, the factis that he has been in Honolulu since being noticed for his deposition and he has never made any effort to arrange for the taking of the deposition. Mr. Low could easily have called the appellees' counsel by telephone while he was in town. But he did not. He could have instructed Mr. Tibbits to follow up. But he did not. Nor did Mr. Tibbits take it upon himself to confirm either

the District Court's or the appellees' assent to a continuance of the deposition or to the continuance of the pretrial conference.

The appellant contends throughout Section I of the Opening Brief that Mr. Low was willing to have his deposition taken at any time upon two weeks' notice. However, Mr. Low never expressed such willingness to the appellees or to the District Court until after the case had been dismissed. Mr. Low's affidavit shows a deliberate choice on his part not to appear and to let matters drift and take their own course. In Fisher v. Dover Steamship Co., 218 F.2d 682 (2d Cir. 1954), the plaintiff was served with a notice to take deposition of the plaintiff. The plaintiff failed to appear for a deposition and the case was dismissed under Rule 41(b). A motion brought on plaintiff's behalf under Rule 60(b) was denied by the District Court, and this denial was affirmed by the Court of Appeals. The Court of Appeals specifically noted that the plaintiff did not present himself for a deposition at any time after the date noticed and that the plaintiff's personal inaction and neglect justified the dismissal. Mr. Low knew that the appellees wished to take his deposition and a cursory check would have revealed that no continuance had been granted. Mr. Low's failure to respond to the notice or to make any effort after his default to arrange for the taking of his deposition shows only his lack of concern about the proceeding of this action.

3. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO VACATE WITHDRAWAL OF COUNSEL AND REINSTATE COUNSEL OF RECORD.

Throughout the Opening Brief the appellant maintains that the withdrawal of Shim & Naito as counsel on June 22, 1966 (Record pp. 342-343) was not accomplished in a proper manner and that the improper withdrawal excuses the appellant's defaults in this action. It appears that appellant was advised that its local counsel was withdrawing as early as March 10, 1966 (Record p. 346). Appellant was advised in June 1966, by the Clerk of the District Court, that its local counsel had withdrawn (Record p. 464-a). Appellant made no objection to the withdrawal for three months after the notification by the Clerk and until after the action had been dismissed. It is submitted that appellant's objection came too late and that the District Court did not abuse its discretion in denying the motion to vacate withdrawal.

Appellant contends that an attorney may never withdraw without the consent of his client. This contention is refuted by the very authority cited by the appellant.* An attorney may always withdraw upon a showing of good cause, which includes, for example, the failure of the client to make payments of fees during

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*Appellant refers the Court to 7 C.J.S. Attorney and Client, §§120 and 121 (1937). Appellees refer the Court to 7 C.J.S. Attorney and Client, §110 (1937).

litigation. See, e.g., Harms v. Simkin, 322 S.W.2d 930 (Mo.App. 1959), or when the attorney discovers his client has no cause, see McNealy v. State, 183 So.2d 738 (Fla.App. 1966). The memorandum in support of withdrawal of counsel executed by Messrs. Naito, Shim and Oki indicates that Mr. Naito had withdrawn from private practice to become a full-time employee of the State of Hawaii. Is it appellant's contention that Mr. Naito should resign his position with the State in order to represent appellant for nothing? Suppose Mr. Naito had been offered an appointment to the judiciary. Is it appellant's contention that Mr. Naito would be unable to accept the position offered until the instant case was finally resolved or until the appellant could secure local counsel willing to work without compensation? It is worthy of note that the appellant complains that the "usual and proper procedure" was not followed with respect to the withdrawal of counsel (Opening Brief, p. 15). However, in spite of the rule that an enlargement of time may only be allowed by the court,* the appellant argues that it was entitled to assume that a continuance of deposition and pretrial conference had been granted merely because the appellees did not respond to a letter. (Opening Brief, p. 8).

Although the local rules require the retaining of local counsel, the action was not dismissed on this ground. Appellant

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*Rule 6(b) Federal Rules of Civil Procedure.

apparently believes that it is entitled to delay the action indefinitely until local counsel can be obtained who will work on a contingency basis. However, the refusal or inability of the appellant to pay the transportation expenses of its primary counsel or to compensate local counsel has never been recognized as an excuse justifying a delay in prosecution.

Aside from the failure of the appellant to object to the withdrawal of counsel in a timely manner, the question of whether a further continuance is justified because of withdrawal of counsel is a matter for the court to decide in its discretion. In Grunewald v. Missouri Pacific R. Co., 331 F.2d 983 (8th Cir., 1964), the attorney for the plaintiff withdrew several days before the trial and a new attorney wired the clerk of the District Court requesting a continuance. No one appeared for the plaintiff at trial and the District Court dismissed the action for failure to prosecute. In reviewing the history of the case, the Court of Appeals noted that the case had been at issue for seventeen months before dismissal and that various continuances had been granted because of prior changes in counsel. The Court summarized the law as to dismissal for lack of prosecution and withdrawal of counsel as follows (331 F.2d at 985-986):

> "It is well settled, of course, that a federal court has inherent power to dismiss a civil case for want of prosecution. . . .Dismissal for this reason is then a matter of discretion. On appeal the applicable standard is that of the presence or absence of abuse. The Supreme Court said, in Link, supra, p. 633 of 370 U.S., p. 1390 of 82 S.Ct.,

'Whether such an order can stand on appeal depends not on power but on whether its was within the permissible range of the court's discretion.'

. . .

"It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. 48 A.L.R.2d 1155, 1157-1158, and cases cited; Harms v. Simkin, 322 S.W.2d 930, 933 (Mo.App. 1959). Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated. . ."*

. . .

"The cited annotation at 48 A.L.R.2d 1155 concerns withdrawal or discharge of counsel in a civil case as ground for continuance. It observes, 48 A.L.R.2d p. 1159, that

'***the cases in which the refusal of continuance was held justified outnumber, by ratio of three to one, the cases in which the refusal of continuance was held arbitrary--a clear indication of the fact that the exercise of discretion by the trial court will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence.'"

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* In defining discretion the court in Grunewald quoted with approval its definition in Bowles v. Goebel, 151 F.2d 671, 674 (8th Cir., 1945) as follows (331 F.2d at 986):

"'Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists.*** And the process of an appellate court in examining exercised discretion for abuse is not one of creating prescriptions and definitions for the curbing of judgment generally, but simply one of viewing the action taken in an immediate case in the relativeness of its entire situation to see whether it compels the conviction that there has been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation.'

The Court of Appeals noting the drawn-out history of the litigation and that there was no showing that the withdrawal of counsel immediately before trial "was without prior notice to the plaintiff or without her consent or fault" (Grunewald v. Missouri Pacific R. Co., supra, at 987) held that the dismissal was not an abuse of discretion subject to reversal.

In the instant case the appellant had notice of its local counsel's intention to withdraw six months prior to the withdrawal of the action (Record p. 346) and the appellant made no objection to the withdrawal until after the case was dismissed. Furthermore, the appellant had ample time to set the case for trial prior to receiving notice of local counsel's withdrawal. It was within the discretion of the District Court to assume that the failure of the appellant to bring the case to trial, while it had local counsel, was attributable to the appellant's negligence and lack of diligence.

4. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO VACATE DISMISSAL.

On September 10, 1966 the appellant moved to vacate the dismissal and moved for a rehearing on the appellees' motion to dismiss. The appellant noticed the hearing for September 20, 1966 (Record p. 386). When the appellant's

counsel failed to appear at the hearing, the District Court continued the hearing until September 26, 1966 and the Clerk of the District Court sent a letter to the appellant's counsel urging him to appear at the hearing "with or without local counsel". (Record p. 470). The appellant's counsel failed to appear at the hearing on September 26, 1966 and after hearing argument from the appellees and the testimony of Alvin Shim, Esq., the District Court denied the appellant's motion to vacate dismissal.

In effect, the District Court gave the appellant an opportunity for a rehearing on the motion to dismiss but the appellant's counsel refused to appear.

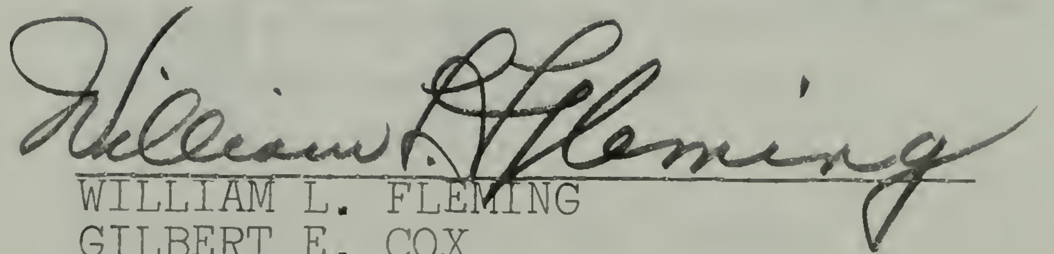
In view of the long period of unexplained delay in the action, the various defaults on the part of the appellant, and finally, the repeated refusal of the appellant's counsel to appear before the Court, it is submitted that it was not only proper for the District Court to deny the motion to vacate dismissal, but that it would have been an abuse of discretion on the part of the District Court to have permitted the appellant to further occupy the time of the appellees or the Court in this litigation.

CONCLUSION

There was no abuse of discretion on the part of the District Court in finding that the appellant neglected its duty to diligently prosecute this case. The District Court, faced with a record replete with the appellant's delay and the refusal of appellant's counsel to appear before the Court, did not abuse its discretion in ordering the dismissal of this action for lack of prosecution and for failure to appear for deposition or in denying appellant's motions to vacate the dismissal and to vacate withdrawal of counsel.

DATED: Honolulu, Hawaii, January 13, 1968.

Respectfully submitted,



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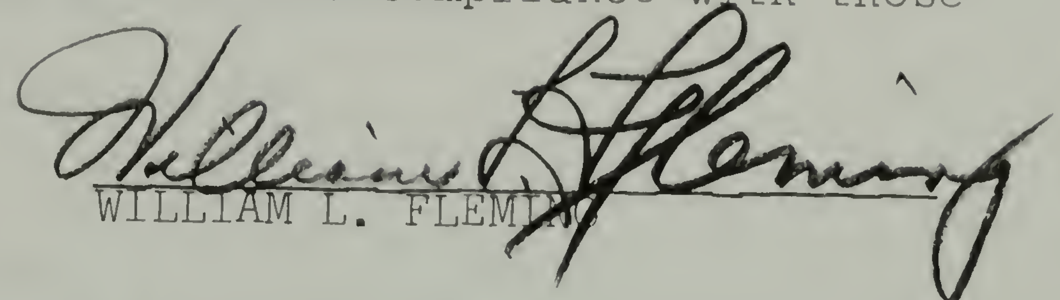
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my

opinion, the foregoing brief is in full compliance with those Rules.



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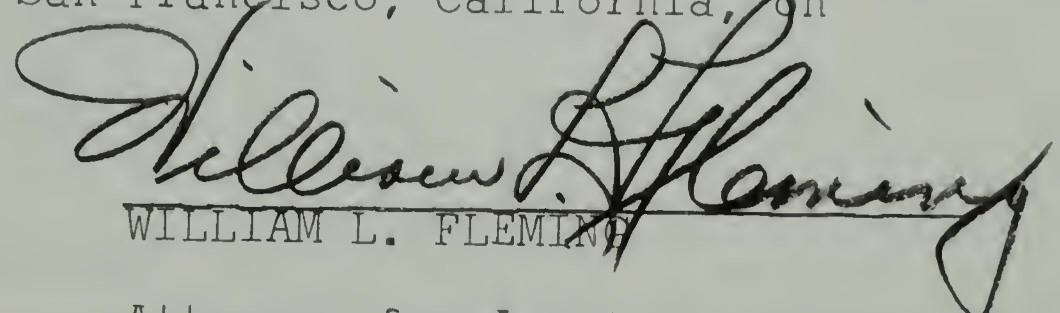
CERTIFICATE OF MAILING

It is hereby certified that service of the foregoing Answering Brief of Appellees was made upon the Appellant by mailing three copies hereof to Appellant's attorney, Arthur H. Tibbits, 55 New Montgomery Street, San Francisco, California, on January 13, 1968.



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